EU Case Law

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Abstract: This section provides an overview of cases in front of the Court of Justice of the European Union concerning contract law. The present issue covers the period between the beginning of July 2015 and the end of April 2016.

General Law of Contract and Obligations

Lack of conformity which became apparent within six months of delivery of the goods: Judgment in Case C-497/13 *Faber*[1]

The present case concerns a key provision of European consumer protection legislation. On 27 May 2008, Ms Farber bought a used car at the Dutch Hazet garage. On 26 September 2008, while she was travelling to a business meeting, the car caught fire and completely burned down. It was towed to Hazet garage and eventually moved to a scrap yard where it was scrapped shortly after. Therefore, the exact cause of the fire was not determined. By letter of 11 May 2009, Ms Farber notified the Hazet garage that she was holding it liable for the destruction of the car and of various personal objects which had travelled in the car. In the ensuing trial, the court of first instance did not bother to determine whether Ms Farber had purchased the car in her capacity as a consumer. The court of appeals referred the case to the CJEU. Against this factual background, the judgment addressed three main questions, all relating to different procedural aspects of the enforcement of consumer rights.

First, the CJEU confirmed that the principles of equivalence and effectiveness shape the national courts' decision on whether to investigate *ex officio* whether a

1 For a detailed discussion of this case, see P. Hacker, One Size Fits All? Heterogeneity and the Enforcement of Consumer Rights in the EU after Faber in this issue.

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contract was concluded by a consumer; this is relevant whenever that status is doubtful in view of the facts brought forward by the parties. The principle of effectiveness has even greater impact. If domestic procedural rules bar the court from classifying the party as either 'consumer' or 'non-consumer', it demands that the court nevertheless proceed to that classification if the court has the relevant facts at its disposal or can ascertain them by making a simple request for clarification. This consequence of the effectiveness principle holds even when the party is represented by a lawyer in the specific case. The CJEU added that rules relating to the burden of proof regarding lack of conformity, such as Article 5(3) of Directive 1999/44, must be applied by national courts of their own motion. It is this proof of lack of conformity with which the remainder of the judgment deals.

Thus, second, the CJEU unsurprisingly held that Article 5(2) of Directive 1999/44 does not preclude a national rule which provides that the consumer must inform the seller of the lack of conformity in good time lest he lose his rights derived from the directive. The period of notification may not be less than two months from the date on which the consumer detected the lack of conformity. Article 5(2) of Directive 1999/44 grants Member States precisely the power to introduce such rules. The only detail the CJEU added is that the notification need only relate to the existence of the lack of conformity and that it may not be subject to rules of evidence which would make it excessively difficult for the consumer to exercise his rights.

Third and finally, the Court addressed perhaps the most important question of the case: the exact scope of the reversal of burden of proof contained in Article 5(3) of Directive 1999/44 (six months rule). If the lack of conformity becomes apparent within six months of delivery of the goods, Article 5(3) states that, notwithstanding some exceptions, the lack of conformity is presumed to have existed at the moment of delivery. The CJEU held that the 'consumer is required to prove only that the lack of conformity exists', being 'not required to prove the cause of that lack of conformity or to establish that its origin is attributable to the seller' (para 70). Furthermore, the consumer must prove that the lack of conformity became physically apparent within six months of delivery of the goods. As a consequence, the burden shifts to the seller to prove that the cause of the lack of conformity can be found in an act or omission which took place after delivery.

Termination of the agency contract by the principal and compensation of the agent: Judgment in Case C-338/14 *Quenon*

The plaintiff of the main proceedings, Quenon, acted both as a commercial agent for Citibank, selling banking products, and as an insurance agent for Citilife,

selling insurance products. In January 2004, Citibank terminated its agency contract and paid both a termination indemnity and a goodwill indemnity. As a result of that termination, Quenon lost access to the data bank it used to manage the portfolio of Citilife insurance products, making it de facto impossible for Quenon to continue to perform the insurance agency contract. In the ensuing trial, Quenon demanded from Citibank and Citilife, jointly or severally, to pay an indemnity regarding the insurance agency contract and supplementary damages. The defendants claimed that Article 17(2) of the Sales Agents Directive 86/653/EEC prevents the simultaneous award of an indemnity and damages.

Against this factual background, the judgment addressed two main questions.

First, the CJEU held that Article 17(2) of Directive 86/653/EEC does not preclude national legislation enabling the sales agent to seek simultaneous compensation, on termination of an agency contract, both through an indemnity and through additional damages, provided that this does not result in the agent being compensated twice for the loss of commission. The Court argued that Article 17(1) of Directive 86/653/EEC has Member States choose between two varieties of compensation: either an indemnity according to Article 17(2) of Directive 86/653/EEC or damages according to Article 17(3) of Directive 86/653/EEC. The Belgian law applicable in this case provided for a mixture of both: it first opts for the indemnity variety, but allows agents to recover additional damages for the amount in which actual damages exceed the indemnity they are entitled to. At first glance, this seems to contradict the dichotomy inherent in Article 17 of Directive 86/653/EEC. However, the CJEU convincingly argued that Article 17(2)(c) of Directive 86/653/EEC clearly speaks against the mutual exclusivity of indemnity and damages by providing that the 'grant of such an indemnity shall not prevent the commercial agent from seeking damages.' These damages, according to the CJEU, are not subject to the limitations enumerated in Article 17(2)(a) and (b) of Directive 86/653/EEC, which again clearly follows from the systematic position of Article 17(2)(c) of Directive 86/653/EEC outside of the subparagraphs determining the preconditions and limitations for indemnities. Furthermore, the CJEU followed the Advocate General in noting that the harmonizing effect of Article 17(2) of Directive 86/653/EEC only applies to indemnity for customers, not to all other potential sources of compensation, be they in contract or tort law. Quite naturally, however, the simultaneous application of indemnity and damages regimes may not lead to double compensation for a single instance of loss.

Second, the Court inquired into the preconditions the directive erects for the award of damages. More precisely, it was unclear whether the damage regime required fault attributable to the principal and a loss distinct from the one covered by the indemnity regime. Regarding fault, the CJEU held that in the absence of

concrete specifications of circumstances for damages in the directive, the prerequisites are left to the discretion of Member States. These may or may not require the existence of fault. However, the recovery of damages must relate to losses distinct from those compensated by the indemnity regime. The CJEU convincingly pointed out that otherwise the preconditions and limitations of Article 17(2) of Directive 86/653/EEC could be easily circumvented.

Consumer Protection

Advertising

Labelling concerning Sodium chloride (table salt) or total amount of sodium in mineral waters: Judgment in Case C-157/14 *Neptune Distribution*

The case concerns a question at the intersection of chemistry, medicine and the law. Neptune Distribution sells mineral water which is high in sodium bicarbonate but low in sodium chloride. Sodium chloride is the chemical denomination for table salt and has been shown to be linked to medical issues such as arterial tension. The scientific literature on sodium bicarbonate is more ambiguous with respect to its negative health implications. On its labels, Neptune Distribution factually correctly stated that its mineral water mainly contains sodium bicarbonate and is low in salt (sodium chloride). However, the relevant Regulation1924/2006 on nutrition and health claims made on foods and Directive 2009/54/EC on the exploitation and marketing of natural mineral waters do not distinguish between different types of sodium in their labelling provisions. Therefore, the French health authorities enjoined Neptune Distribution from including statements on its label that could lead consumers to believe that its waters were low or very low in salt or sodium, prohibiting also the statements distinguishing between sodium bicarbonate and sodium chloride. The appeal of Neptune Distribution against this decision thus joins a long string of cases dealing with potentially misleading labels on foodstuff.[2]

Against this factual background, the judgment addressed two main questions.

2 See, eg, P. Hacker, 'The Behavioral Divide. A Critique of the Differential Application of Behavioral Law Economics in the EU and the US' 11 *European Review of Contract Law* 299, 323–327 (2015), also for the rationality implications inherent in these cases and pertinent regulations.

First, the CJEU noted that as a matter of positive law, the Annex to Regulation 1924/2006 allows claims that some foodstuff is low in sodium or salt only if the amount of sodium generally, ie, including both sodium bicarbonate and chloride, is below a certain threshold. Similarly, the Annex III to Directive 2009/54/EC permits the indication on mineral waters of being suitable for low-sodium diet only if (total) sodium content is less than 20 mg/l. Therefore, both norms do not distinguish between different components of sodium, even though the medical implications might differ from one to the other. The CJEU reminds us that these rules are meant to give consumers 'the necessary information to make choices in full knowledge of facts' (para 49).[3] It seems ironic that, given this aim, the Court went on to uphold the decisions by the French health authorities which prevent the distributor from differentiating between different types of sodium, ie, from giving more and fuller information to the consumer. Rather, the Court held, labelling of natural mineral water bottles may only suggest that they are suitable for low-sodium diet if the total sodium content, aggregating over all chemical forms, is less than 20 mg/l.

Second, the CJEU responded to the question of the Conseil d'État casting doubt on the validity of these provisions in the light of the freedom of expression and the freedom to conduct a business guaranteed under the Charter of Fundamental Rights and the European Convention on Human Rights. The case thus presents another instance of the complex interactions of fundamental rights with provisions governing duties of information owed between private parties. Unsurprisingly, however, the Court held that the protection of human health and consumer protection are legitimate objectives of general interest which may limit the aforesaid fundamental rights. The CJEU granted broad discretion to the EU legislature for implementing the principle of proportionality in the present case since it 'entails political, economic and social choices on its part, and [...] it is called upon to undertake complex assessments.' The Court confirmed the proportionality of the EU regulations which help to prevent, in its eyes, misleading statements by producers. The judgment notes that factually correct but incomplete statements (addressing only one of several types of sodium) may mislead consumers. Moreover, the precautionary principle speaks in favour of including sodium bicarbonate among the substances potentially damaging to human health since the scientific evidence is inconclusive about its effects at the moment. Again, the CJEU in the domain of health thus aimed for a high level of protection

3 For a critique, see P. Hacker, *Verhaltensökonomik und Normativität. Die Grenzen des Informationsmodells im Privatrecht und seine Alternativen* (forthcoming); Hacker, n 2 above.

of consumers, even of those (boundedly rational ones) easily misled by factually correct but incomplete statements.[4]

Country of origin labelling concerning footwear: Judgment in Case C-95/14 *Unione Nazionale Industria Conciaria*

This judgment presents another instance of labelling, this time, however, of footwear. In order to enhance consumer information and to protect its national leather industry, Italy had passed a law according to which the materials in footwear must include a label indicating their country of origin. The question before the Court therefore was whether such national legislation is compatible with European legislation on the labelling of footwear.

The CJEU first noted that Directive 94/11 on the labelling of the materials used in the main components of footwear for sale to the consumer is intended to reduce trade barriers between Member States. It therefore provides 'exhaustive harmonization' (para 39), not only minimum requirements, concerning the labelling requirements of footwear. This includes both goods produced in other Member States and goods produced in Non-Member States but in free circulation within the EU. Requirements to disclose the country of origin of the goods or materials the good is made of is not contemplated by the directive. While this alone would have been sufficient to render the labelling law invalid, the CJEU, more contentiously, took the occasion to make a general point against country of origin labelling which, in its view, slows down economic exchange and interpenetration within the EU. It fully neglects, however, potential beneficial effects of country of origin labelling both for consumers who prefer to shop for local products and, as a consequence, for the environment at large. In the light of positive law, the decision is thus straightforward; its wider implications on a general reservations against country (or, for that matter, region) of origin labelling based solely on its alleged detrimental effects on economic interpenetration should not be accepted, however, without further scrutiny.

Display of reference price: Judgment in Case C-13/15 *Cdiscount*

Unfair trade practices often revolve around concrete formats of price display. In France, a law prohibited the announcement of price reductions which do not

4 Cf Hacker, n 2 above, 312 with n 62.

include a reference price enabling consumers to determine by how much the price has been reduced. Such an unreferenced price reduction was undertaken by Cdiscount, an e-commerce retail store. The French court of appeals referred to the CJEU the question of whether the French law is compatible with EU legislation, specifically with Directive 2005/29 on Unfair Commercial Practices (UCP).

The CJEU first analysed whether the purpose of the French law is to protect consumers, which would bring it under the scope of application of the UCP directive. It left this question to be answered by the national courts. If the question is answered in the affirmative, then a price reduction would constitute a 'business-to-consumer commercial practice' in the sense of Article 2(d) of the UCP directive. This is relevant because the UCP directive provides for full harmonization of the relevant national regimes on unfair business-to-consumer commercial practices, preventing Member States from enacting stricter laws to protect consumers in this domain. The Court found that the French law would constitute such a precluded stricter type of legislation if, according to the law, no case-by-case assessment is warranted to assess the unfairness of specific price reductions. This follows from the distinction, in the UCP directive, between practices regarded as unfair in all circumstances and those where a case-by-case assessment is needed. The former are contained in an exhaustive 'black list' in Annex I of the UCP directive, which does not contain unreferenced price reductions.

Passenger rights and package holiday

Liability of an air carrier in the event of delay in the international carriage of passengers with contract of carriage concluded by the passengers' employer: Judgment in Case C-429/14 *Air Baltic*

A Lithuanian government agency purchased flight tickets from Vilnius via Riga and Moscow to Baku with Air Baltic for two of its agents. The flight from Riga to Moscow was delayed, causing the agents to miss their connecting flight to Baku. Therefore, they arrived in Baku one day later. As a result, the Lithuanian government agency was compelled, under Lithuanian laws, to pay the agents compensation in the amount of approximately €338. The agency claimed this amount from Air Baltic; the carrier alleged that it is liable only to the passengers themselves and not to their employer.

The CJEU concluded that the case falls within the scope of the Convention for the Unification of Certain Rules for International Carriage by Air, concluded at

Montreal on 28 May 1999 (Montreal Convention), which was approved by the Council on behalf of the EU on 5 April 2001 in its Decision 2001/539/EC and thus entered into force with respect to the European Union on 28 June 2004. In its Article 19, the Montreal Convention provides that the 'carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo.' The third recital of the Montreal Convention speaks of the need to ensure the protection of the interests of consumers in international air carriage; the Court inferred from the distinction between consumers and passengers that those protected by the Convention need not necessarily be passengers. Decisively and convincingly, the Court argued that the basis for compensation flows from the contract concluded between the air carrier and its counterparty, independent of whether that counterparty is identical with the passenger. Since in the present case the employer concluded the contract, the air carrier was liable to the employer for the delay caused to the employees as passengers. However, the limitation of the amount of damages provided for in Art. 22 of the Montreal Convention remained applicable.

Passengers' rights in the event of delay or cancellation of a flight and extraordinary circumstances: Judgment in Case C-257/14 *Corina van der Lans*

The present case covers one of the key areas of passenger compensation, namely the question when 'extraordinary circumstances' shield air carriers from liability vis-à-vis their passengers. Ms. van der Lans had purchased a ticket with KLM for a flight from Quito (Ecuador) to Amsterdam which arrived with a delay of 29 hours, having departed 34 hours behind schedule. This was caused by a technical problem discovered during the 'push back' on the ground in Quito: one of the engines failed to start, lacking fuel. KLM acknowledged that two components, the engine fuel pump and the hydro-mechanical unit, were defective and caused the engine failure. They had to be flown in from Amsterdam, which caused the long delay. The defective components, however, had not exceeded their average lifetime; they had last been tested about one month before the flight at issue. KLM invoked extraordinary circumstances to avoid liability.

The CJEU held that a technical problem which occurs unexpectedly, which is not attributable to defective maintenance and which was not detected during regular tests, does not qualify as 'extraordinary circumstances which could not have been avoided even if all reasonable measures have been taken' pursuant to Article 5(3) of Regulation 261/2004. The Court reiterated that this Article, providing an exception to the general rule of compensation for passengers, must be construed strictly. Therefore, in general terms, technical problems are not extra-

ordinary circumstances since they regularly arise in the course of air travel. Specific technical problems, however, may qualify as extraordinary circumstances, for example the sudden discovery of a hidden manufacturing defect, or damage to aircraft caused by sabotage and terrorism. The problems at issue did not fall under these specific, extraordinary problems. They affected only one particular aircraft, were inherent to the complex operating system of the aircraft, and were not beyond the actual control of the carrier. Thus, the presence of extraordinary circumstances was convincingly denied.

Unfair contract terms

Judicial review of standard terms and the enforcement of orders for payment: Judgement in Case C-49/14 *Finanmadrid*

This is another decision in the line of cases brought by Spanish courts to the CJEU that deal with the effects of the Unfair Terms Directive 93/13/EC on enforcement proceedings (see eg C-618/10 *Banco Español de Crédito*; C-415/11 *Aziz*). In the case at hand, Finanmadrid acquired an order for payment against J.V. Albán Zambrano. In the process, the Secretario judicial of the competent court had, as required by Spanish law, not reviewed the terms of the underlying contract. When Finanmadrid applied for execution of the order for payment, the Spanish court could, under national law, not review the contractual terms either since the decision of the Secretario judicial was an enforceable procedural instrument with the force of *res judicata*. The CJEU found that the Unfair Terms Directive precludes such legislation, i.e. legislation 'which does not permit the court ruling on the enforcement of an order for payment to assess of its own motion whether a term in a contract concluded between a seller or supplier and a consumer is unfair, when the authority hearing the application for an order for payment does not have the power to make such an assessment'. The fact that the addressee of the order for payment, Albán Zambrano, could have triggered a judicial review of the terms had he objected to the order for payment in due time did not suffice, according to the CJEU. The Court convincingly argued that consumers might not lodge the objection because of the particularly short time (20 days), because of the costs of legal proceedings, because they are unaware of their rights or because of the limited content of the application for the order for payment and the limited amount of information that consumers therefore have. The judgement confirms and extends the ruling of Case C-618/10 *Banco Español de Crédito* (a case where a judge, not a body such as the Secretario judicial, was competent for deciding upon the order for payment).

No obligation for notaries to conduct unfair terms review: Judgement in Case C-32/14 *ERSTE Bank Hungary*

Again, the procedural implications of the Unfair Terms Directive were at stake. This time, the question was not whether a court had to review the terms of a contract but whether the Directive also contained obligations for notaries. The facts giving rise to this dispute were as follows: ERSTE Bank and Mr Sugár, from Hungary, concluded a loan agreement and Mr Sugár signed an acknowledgement of debt as a notarised document. When the consumer defaulted on the payments, the bank requested the affixation of the enforcement clause on the acknowledgement of debt from the notary. While the notary did check whether formal requirements were met, he did not, in accordance with Hungarian law, review the underlying contractual agreements as regards unfair terms. Mr Sugár, arguing that the contract was unfair, brought an action before the Budapest Municipal Court, which in turn engaged the CJEU, asking whether it was in accordance with Article 7 of the Unfair Terms Directive that notaries did not have to review the unfairness of the contractual terms. Contrary to what might have been expected after preceding judgements such as *Banco Español de Crédito* (and to what the Commission argued), the Court found Hungarian law to guarantee adequate and effective means to stop the use of unfair terms in consumer contracts as required by the directive. The CJEU essentially based its decision on the different functions of judges and notaries and on the sufficient procedural options that Hungarian law grants to consumers such as Mr Sugár. The Court acknowledged that consumers might be less vigilant when a notary drafts a contract since they generally trust his impartiality. Without developing this argument further, however, the CJEU then pointed to the fact that Hungarian law authorises notaries to verify in the stage of drafting whether contracts are unfair and to inform the parties if they find them to be so, thus contributing to the compliance with the requirements laid down in Articles 6(1) and 7(1). Moreover, the Court stressed that consumers in situations such as Mr Sugár can challenge the validity of contracts and can initiate court proceedings to exclude or limit the enforcement under Hungarian law. The mere fact that a consumer would have to turn to a court and not simply to the notary was not contrary to the principle of effectiveness. The requirements of the Unfair Terms Directive did not go so far 'as to make up fully for the total inertia on the part of the consumer concerned', the Court stated. The idea of effective legal protection was based on the premise that one of the parties brought an action.

Consumer credit

Foreign currency denominated loan and investment services: Judgment in Case C-312/14 *Banif Plus Bank*

The regulatory and contractual framework for financial services contracts is primarily determined by the directives applicable to the concrete transactions at issue. For MiFID I to apply, the transaction must qualify as an investment service or activity. This is what the present case deals with.

Mr Lantos concluded a consumer credit agreement with Banif Plus Bank to buy a car. The particularity of the loan was its denomination in a foreign currency, coupled with elements at first glance akin to a currency swap. It involved three steps: first, the bank calculated the amount in foreign currency equivalent to the amount that it had to advance in Hungarian forints, but using the exchange rate of a previously determined date. Second, the bank purchased this exact amount in foreign currency from the client based on the actual exchange rate applicable at the time of the advance of the loan and paid the 'real equivalent' amount in Hungarian forints to the client. Third, at the time of repayment, the client bought from the bank the foreign currency in exchange for forints, based on the actual exchange rate applicable at that time. The client had to repay the loan in the foreign currency. Economically, the reason for this arrangement seems to have been for the client to get access to a lower interest rate (in the foreign currency) in exchange for assuming the risk of foreign currency appreciation. The question before the CJEU was whether this loan agreement constituted an investment service or activity.

The Court observed first that investment services or activities pursuant to Article 4(1)(2) of MiFID I include only the services or activities listed in Section A of Annex I which relate to any of the instruments listed in Section C of that annex. However, the currency exchange contemplated in the loan agreement does not fall under any of the activities listed in Section A since it is, in the eyes of the Court, 'entirely incidental to the granting and repayment of a foreign currency denominated consumer loan' (para 55). In that context, the currency exchange only converts the amounts of the loan and of monthly instalments from foreign currency into domestic currency since payment obligations have to be met in foreign currency but payments are actually made in domestic currency. The Court noted that under these conditions the currency exchange 'serve[s] no other function than to be the manner of performing the fundamental payment obligations under the loan agreement' (para 57).

Furthermore, the exchange was linked to a transaction which constitutes a consumer loan, not a financial instrument as defined in Article 4(1)(17) of MiFID I,

which in turn refers to Section C of Annex I. Specifically, the transaction was not a future since no underlying financial asset was sold, and since the value of the amount of the loan and of the repayment instalments were not fixed in advance but rather calculated on the basis of current exchange rates. Therefore, in sum, the foreign currency denominated consumer loan did not constitute a financial service or activity within the meaning of Article 4(1)(2) of MiFID I.

Lawyers as consumers: Judgment in Case C-110/14 *Costea*

As the previous case reported, the present case deals with a precondition for the applicability of a certain regulatory framework for consumer loans, but this time not regarding MiFID I but the Unfair Terms Directive. Mr Costea is a lawyer specializing in the field of commercial law. He concluded a credit contract with Volksbank in April 2008 the purpose of which was not specified and the repayment of which was secured by a mortgage registered against the building belonging to his law firm. The agreement was signed by Mr Costea both in his capacity as a borrower and as the representative of his law firm with respect to the mortgage. Later, Mr Costea sought a declaratory judgment confirming that a contractual term concerning a 'risk charge' was unfair and invalid.

The CJEU observed that for the Unfair Terms Directive to be applicable, Mr Costea must have acted as a consumer within the meaning of Article 2(b) of that directive. This implies that he must have acted for purposes which are outside his trade, business or profession. The Court noted that this concept is an objective one and thus independent from the knowledge or information the acting person actually has. For the concrete determination of the status of the lawyer, the Court proceeded in two steps. First, it followed the Advocate General in holding that the nature of the security, ie, the mortgage on the law firm's property, is irrelevant for the determination of the status of the lawyer vis-à-vis the loan itself. This is convincing since indeed assets belonging to the professional sphere of a client may be used to secure loans which he takes out for purely private purposes. If at all, the question is whether the client has authority to pledge such professional assets as collateral for his private undertakings; this, however, is a different issue independent of his status as a consumer. Second, a lawyer may, despite his great technical expertise in the formation of contracts, be deemed a consumer if and only if the concrete contract at issue does not relate to his profession. The Court noted that there is an inequality between regular 'client-consumers' and lawyers. However, it argued that the lawyer is still in a weaker position vis-à-vis the seller/supplier when the contract does not relate to his profession in two ways: (i) the lawyer may not have expertise with respect to that particular contract, in contrast

to the seller/supplier; (ii) he lacks bargaining power since he is unable to influence the terms of the contract. This analysis is incomplete in both prongs. Depending on the concrete contract, the lawyer may have considerable expertise, given his professional formation, even if the concrete contract is not concluded for *purposes* of his profession. Moreover, lack of bargaining power should not be equated with impossibility to influence the concrete terms of the contract, but chiefly depends on the alternatives the lawyer has, which in turn is defined by the market structure, the lawyer's search costs etc. in the concrete case. All in all, the judgment testifies to the tension between a rigid system of categorization based on status (consumer or not consumer) and significant heterogeneity, with respect to knowledge, bargaining power etc., within these status groups. As a matter of positive law, however, the upshot of the judgment is that a lawyer may or may not be considered a consumer, depending on whether he acts for purposes outside of his profession are not.

Contracts of guarantee or providing security concluded with a credit institution by natural persons acting for purposes outside their trade, business or profession: Judgment in Case C-74/15 *Tarcău*

The next case again deals with the concept of 'consumer'. A bank lent money to a commercial company under a credit agreement. At a later point, in order to increase the credit line of the commercial company, two security contracts were concluded between the bank and two natural persons, the parents of the sole shareholder and director of the commercial company. The parents claimed that they only wanted to help their son and hence signed a guarantee of the repayment of the loans as well as a mortgage agreement relating to immovable property they owned. Later, they challenged some clauses of these security agreements as unfair.

The CJEU distinguished the Unfair Terms Directive from Directive 87/102/EEC on consumer credit insofar as contracts of guarantee are excluded only from the scope of the latter, not of the former directive. Rather, the applicability of the former turns on whether the parents had acted in their capacity as consumers. The Court convincingly argued that despite the security contracts being ancillary to the loan agreement, they constitute separate contracts with parties different from those of the loan agreement. Therefore, the status of the parents in signing these security contracts must be analyzed separately. Hence, they may be deemed consumers if they acted for purposes of a private nature and have no links of a functional nature with the commercial company, such as a directorship or ownership of a non-negligible amount of shares.

Competition law, Public procurement and State regulation

Common computerised booking system as a concerted practice: Judgment in Case C-74/14 *Eturas*

The case presents an intriguing pattern taken from the digital world of commerce. A number of independent travel agencies used a common program (E-TURAS) administrated by the company owning the copyright on the program. E-TURAS could be used to offer travel packages and other travel services online. In August 2009, the administrator of E-TURAS sent a message to participating companies in which he announced that discount rates for travel packages would henceforth be technically capped at 3%. After the technical change was implemented, it was still possible but technically more complicated for the agencies to offer discounts in excess of 3%. Some of the agencies, however, claim not to have read the message or not to have offered any travel services via E-TURAS after the cap was implemented. Nevertheless, the Lithuanian Competition Council found that all agencies that did not actively object to the cap were tacitly engaging in a concerted anticompetitive practice. Two agencies challenged this decision.

The CJEU started by noting that even passive modes of participation in infringements, such as the mere presence in meetings at which anticompetitive agreements are concluded, renders an undertaking liable under Article 101 TFEU. The burden of proof regarding tacit approval of anticompetitive initiatives rests with the party or authority alleging the infringement, Article 2 of Regulation 1/2003, in this case the Lithuanian Competition Council. The Regulation, however, is silent on the standard of proof and on specific assessments of evidence. Therefore, these must be established by the respective national legal orders, taking account of the principles of equivalence and effectiveness. The latter, however, demands that concerted practices may also be proven by indirect evidence or indicia. In the concrete case, this meant that involvement in the concerted practice may be inferred for those agencies that indeed were aware of the message sent by the administrator, unless that presumption is rebutted by an objection of the travel agency, eg by a message to the E-TURAS administrator, by public distancing, or by reporting the message to the administrative authorities. The mere reception of the message announcing the cap, however, did not suffice to establish the participation in a concerted practice in the light of the presumption of innocence applicable in competition law proceedings.

'Veto clause' in commercial lease agreements for shopping centres: Judgment in Case C-345/14 *Maxima Latvija*

A large Latvian business entity, Maxima Latvija, which operates shops and hypermarkets, concluded a series of commercial lease agreements with shopping centres to rent commercial premises. 12 of the 119 analyzed contracts contained a 'veto clause' conferring on Maxima Latvija the right to object to lease agreements between the shopping centres and other potential lessees. The Latvian Competition Council concluded that in view of the market power held by Maxima Latvija, the clauses were purposefully anticompetitive and infringed Latvian competition law even though the Competition Council did not establish that they in fact rendered the entry of a particular lessee onto the market difficult.

Against this background, the CJEU addressed two questions: whether the veto clauses potentially amount to a restriction of competition by object or to a restriction of competition by effect.

The CJEU reiterated first that the concept of restriction of competition 'by object', Article 101(1) TFEU, must be interpreted restrictively. The agreement must reveal 'in itself a sufficient degree of harm to competition for it to be considered that is not appropriate to assess its effects' (para. 20). This condition was not met by the veto clauses according to the CJEU since they did not imply clearly the restriction of competition by their very nature.

However, second, the veto clauses may have an actual or potential anticompetitive effect if they foreclose access to the local retail food markets. The most relevant factors for the economic and legal analysis of the effects are the position of the contracting parties on the relevant market, the duration of the agreement, and the possibility of competitors to seek leases in alternative shopping centres.

Retroactive rebate scheme: Judgment in Case C-23/14 *Post Danmark*

The next case concerns an all-time classic in competition law: rebate schemes. The scheme under review was operated by Post Danmark from 2003 on, at a time when it had a monopoly on the market for distribution of bulk mail. The rebates were offered to customers sending out at least 3000 copies of advertising mail at a time, and in aggregate batches of at least 30,000 letters per year or representing an annual gross postage value of at least 300,000 Danish crowns (approximately €40,200). The rebate rates were applied on a scale from 6 to 16%, with larger rebates being offered to customers sending more items of mail or mail with a greater value per year. The same conditions applied to all customers. The prices

for mail items were tentatively determined at the beginning of each year based on an estimate of the total expected amount of mail sent by each customer. The final price, including the final rebate, was applied retroactively at the end of the year based on the actual number and value of items sent. In 2007, Bring Citymail Danmark entered the market of bulk mail as the only serious competitor. In 2010, it withdrew from the market after heavy losses. The rebate system of Post Danmark had continued in 2007 and 2008, at a time when 70% of all bulk mail in Danmark was covered by its monopoly. The Danish competition authority concluded that the scheme resulted in an anticompetitive exclusionary effect on the market pursuant to Article 82 EC, ruling out the 'as-efficient-competitor' test championed by Post Danmark.

Against this background, the Court addressed three main questions: the competitive effects of the rebate scheme at issue, the role of the 'as-efficient-competitor' test, and the necessary degree of likelihood of anticompetitive effects.

The CJEU started by reiterating its distinction between quantity discounts, which in principle do not infringe Article 82 EC, and loyalty discounts, which are deemed an abuse of a dominant position. The rebate scheme under review represented neither a clear quantity discount since it applied to an aggregation of orders over a year nor a clear loyalty discount since it lacked arrangements for clients to purchase a given proportion of their supplies from Post Danmark. The assessment of the rebate scheme must consider all circumstances, but particularly: whether there is an objective economic justification for the discounts; that retroactive discounts tend to exert strong pressure on those to whom they are offered; that the scheme indiscriminately applied to monopolized and un-monopolized services; and finally that two thirds of un-monopolized direct advertising mail could not be transferred from Post Danmark to its competitor without an adverse impact on the scale of the rebates, significantly limiting clients' freedom of choice. In conjunction with the very large market share of Post Danmark (95 %), the Court concluded that the rebate scheme at issue produced an anticompetitive exclusionary effect. The fact that the rebate scheme is applied to a large proportion of customers in the relevant market increased the likelihood of such an effect.

Next, the CJEU held that the 'as-efficient-competitor' test was irrelevant for the determination of the legality of the rebate scheme. The test analyzes whether the pricing practices of the dominant undertaking could drive an equally efficient competitor from the market by comparing prices to costs. It has been used by the Court in a number of cases involving pricing schemes (mostly selective or predatory prices and margin squeeze). The test, however, is not a necessary component of the assessment of a rebate scheme, and it was irrelevant in the present case since the emergence of an as-efficient competitor was practically impossible due to the monopolized structure of the market.

Finally, the Court found that the anticompetitive effect must not be purely hypothetical, but probable. However, it need not be serious or appreciable, ie, it need not surpass a *de minimis* threshold, since competition on the market is already weakened in the presence of a dominant undertaking.

Arrangement for sharing clients on a private pension fund market: Judgment in Case C- 172/14 *ING Pensii*

The next case addresses a practice which comes close to hard-core restrictions of competition: arrangements for sharing clients. ING Pensii administered a private pension fund in Romania. In September 2010, the Romanian competition authority imposed fines on ING Pensii and 13 other private pension fund managing companies for agreements to share clients between those companies. These agreements dealt with clients which signed two different private pension fund affiliation applications during an initial affiliation period (so called 'duplications'). According to the agreements, the pension funds shared these duplications equally between them in order to avoid the allocation of these persons by the supervisory authority. The statutory provisions provided that duplications were regarded as not validly affiliated and had to be allocated among the funds in direct proportion to the number of persons whose affiliation had been validated.

The CJEU, as in the 'veto clause' case *Maxima Latvija* reported above, recalled the distinction between agreements or concerted practices with 'anticompetitive object' and those with 'anticompetitive effect'. Customer sharing agreements according to the Court clearly form part of the category of the most serious restrictions of competition and thus fall under the first alternative of 'anticompetitive object'. The agreement at issue, the Court found, served to 'affiliate the persons concerned to limited group of operators, contrary to the statutory rules applicable, and thus to the detriment of other companies operating in the economic sector concerned in the main proceedings' (para 32). The client sharing agreement served as a vehicle for private pension funds to mould the functioning of the newly established obligatory private insurance market at a 'key stage in the formation of that market' (para 47). Lastly, the anticompetitive nature of such an agreement does not depend on the actual number of clients shared between companies since its very object is to restrict competition.

Patent essential to a standard and FRAND licences: Judgment in Case C-170/13 *Huawei Technologies*

The final case again highlights the complex interactions between IP and competition law. Huawei Technologies holds a European patent which is essential to the 'long term evolution' (LTE) standard, a technological standard for high-speed data transfer for mobile phones. Huawei notified the European Telecommunications Standards Institute (ETSI) in March 2009 of the patent and undertook to grant licenses to third parties on fair, reasonable and non-discriminatory (FRAND) terms. ZTE Corporation markets products which use the LTE standard without a license agreement with Huawei. Between November 2010 and the end of March 2011, the two companies discussed the possibility of concluding a license on FRAND terms. Huawei notified ZTE of an amount it considered a reasonable royalty; ZTE requested a cross-licensing agreement; a licensing agreement was never finalized, however. In April 2011, Huawei sued ZTE in a German court for patent infringement. The German court considered that the action brought by Huawei might constitute an abuse of a dominant position.

The CJEU first recalled that the exercise of an intellectual property right by the proprietor can only be deemed abusive conduct in exceptional circumstances. Patents essential to a technological standard (SEPs), however, present a special case since they govern the point of entry to the entire range of products using the standard in question. Therefore, undertakings to unconditionally grant FRAND licenses are used to mitigate concerns over restriction of competition. In such circumstances a refusal to grant a license by the proprietor of the SEP is in principle tantamount to an abuse of a dominant position. The specific problem of the case in the main proceedings was that the parties disagreed about what FRAND terms were, particularly about the amount of royalty to be paid. The CJEU ruled that in such a situation, 'the proprietor of an SEP must comply with conditions which seek to ensure a fair balance between the interests concerned' (para 55).

To avoid an abuse of a dominant position, the proprietor must therefore, first, notify the alleged infringer before bringing an action for patent infringement, even if the SEP has already been used by the alleged infringer. The notice must designate the SEP and specify the infringement. Second, if the alleged infringer is willing to conclude the licensing agreement on FRAND terms, the proprietor of the SEP must make a specific, written offer for such a license including the amount of the royalty and the method of its calculation. The alleged infringer, in turn, must then diligently respond to that offer, taking account of recognized commercial practices in the field and in good faith; delaying tactics are impermissible in the situation. If it does not accept the offer, the alleged infringer must

make a written, specific and prompt counteroffer in accordance with FRAND terms. If the counteroffer, in turn, is rejected, the alleged infringer must provide appropriate security, for example a bank guarantee, if it intends to continue to use the teachings of the SEP in the absence of a finalized licensing agreement. It must also be able to render an account relating to the acts of use of the teachings of the patent. The Court furthermore notes that the parties may, by common agreement, request the determination of the amount of the royalty by an independent third party. Finally, the alleged infringer is free to challenge the validity of the SEP even while negotiating the terms of the license.

All in all, the case shows the willingness of the CJEU to resolve the tensions between IP and competition law by recourse to fine-grained procedural rules designed to ensure a fair balance of the interests of the involved parties.

Employment Law

Travelling time between home and customers as working time: Judgement in Case C-266/14 *Tyco*

Tyco, a Spanish company, ran a business that consisted in installing and maintaining security systems. Its technicians had a geographical area assigned to them, where they were to travel to private homes and industrial and commercial premises in company vehicles to install and maintain security equipment. Tyco set the sequence and times of consumer appointments. It did neither count the time between the workers' homes and the first customer of the day nor the time between the last customer of the day and the workers' return home as working time. The distances covered in those instances varied greatly and could sometimes exceed 100 kilometres and, in one example named, three hours. The CJEU found that the time spans in question did, however, fall under the meaning of working time of point 1 of Article 2 of the Working Time Directive 2003/88/EC. All three requirements of this provision were met: the technicians were working, were at the employer's disposal and carrying out their activity or duties. The Court first confirmed earlier judgements, where it had found, *inter alia*, that provisions on working time constitute rules of EU social law of particular importance, which are necessary to ensure protection of safety and health of workers, and that the concepts of working time and rest periods are mutually exclusive with no intermediate category in between. Against this backdrop, the CJEU then went on to test the three named requirements. As regards the condition that the worker must be carrying out his activity or duties, the Court rejected Tyco's argument that the workers' duties merely entail providing technical services, installing and main-

taining security systems to those customers. On the contrary, it stated that travelling to customers is a necessary means of providing those services. It would 'distort' the concepts of working time and 'jeopardise the objective of protecting the safety and health of workers' to exclude those periods. The CJEU then found that Tyco's workers were also at the disposal of their employer while travelling to and from customers since the employer determined and could change the order of the customers or cancel or add an appointment and since workers were 'not able to use their time freely and pursue their own interests'. The danger of abuse, such as the conduct of personal business on the way, could not influence the legal classification of journey time, the Court argued. Rather, it would be on Tyco to introduce necessary monitoring procedures to prevent abuse. Finally, the Court also saw the requirement according to which the worker must be working as fulfilled. Like the Advocate General it argued, 'given that travelling is an integral part of being a worker without a fixed or habitual place of work, the place of work of such workers cannot be reduced to the physical areas of their work on the premises of their employer's customers'. To find otherwise would be contrary to the objective of protecting the safety and health of workers.

Interpretation of 'transfer of a business' and obligation to make request for a preliminary ruling: Judgement in Case C-160/14 *Ferreira*

A case that had its origins in 1993 led to a judgement by the CJEU on 9 September 2015. Back in 1993, a Portuguese charter airline named Air Atlantis (AIA) was wound up. Most of the employees were dismissed. AIA's main shareholder, TAP, began to operate some of the flights that AIA had contracted to, used some of AIA's assets, among them four aeroplanes, assumed responsibility for some payments and took over AIA's office equipment as well as a number of former AIA employees. Dismissed employees brought an action against the collective redundancy, seeking reinstatement within TAP and payment of their remuneration. After lengthy proceedings and two appeals, the Portuguese Supremo Tribunal de Justiça decided in 2009 that the collective redundancy was lawful, thus contradicting the lower courts, which had held that there was at least a partial transfer of business. During the trial, the Supremo Tribunal de Justiça refused to make a reference to the CJEU for a preliminary ruling. It argued that the CJEU's adjudication on the term 'transfer of a business' of Article 1(1) of the Transfer of Undertakings Directive 2001/23/EC left no material doubt as to interpretation of the provision. Former employees of AIA then sued the Portuguese State for damages, arguing that this decision was manifestly unlawful. This time, the court called

upon did make a request for a preliminary ruling. The CJEU not only held that the concept of a 'transfer of a business' in the meaning of Article 1(1) of Directive 2001/23/EC encompasses a situation such as the one sketched above. It also found the Supremo Tribunal de Justiça had been obliged to make a reference to the Court. Regarding the first finding, the CJEU stated that in the air transport sector the transfer of tangible assets is a key factor. When TAP took over the aeroplanes, it took over essential assets. The Court also found it important that TAP replaced AIA in the ongoing charter flight contracts and that a link remained between the assets and the employees that were taken over to occupy identical positions. This, in the view of the Court, amounted to a 'retention of the functional link of interdependence and complementarity' between the elements of production taken over. Regarding the obligation for a preliminary reference, it must first be noted that the Supremo Tribunal de Justiça was a court against whose decisions there was no judicial remedy under national law. It was therefore obliged to bring the matter before the CJEU according to Article 267 TFEU, unless the application of EU law was so obvious as to leave no scope for reasonable doubt. Contradictory decisions by national courts, the Court stated, do not in themselves mean that there is necessarily reasonable doubt. However, taken together with the difficulties that frequently arise in interpreting the term of transfer of a business, they did give rise to an obligation to make a reference to the Court. Interestingly, the upshot from this decision appears to be this: When a national court of last instance wants to diverge from a lower court's decision that interprets EU law, it has to ask the CJEU first if the interpretation is difficult. This, it seems, would rather be the rule than the exception whenever two courts come to diverging conclusions.

Scope of the Transfer of Undertakings Directive: Judgement in Case C-509/14 *ADIF*

The CJEU decided that the scope of the Transfer of Undertakings Directive covers a situation such as the following: ADIF, a public undertaking, handled intermodal transport units at the train terminal of Bilbao. It outsourced the management to the company Algeposa for several years. Algeposa provided its service in ADIF's facilities, using ADIF's cranes. When the agreement between ADIF and Algeposa terminated, ADIF went back to providing the services with its own staff again. Algeposa collectively dismissed several workers for economic reasons. Neither the fact that the transferee was a public-law body nor the fact that it took back the business it had once pursued excluded the application of the Transfer of Undertakings Directive, according to the CJEU. As regards the issue whether a transfer

of business had occurred in the particular case, the Court did not give a conclusive answer but left this to the national court. It stressed, however, that handling intermodal transport units heavily relies on equipment and is not essentially based on manpower, thus opening up the route for finding that a transfer of business had taken place. As the Court had decided in an earlier case (C-340/01 *Abler*), in such situations there may still be a transfer of a business even if the new contractor does not take over an essential part of the staff.

Leave

Calculation of entitlement to paid annual leave in the event of an increase in working time: Judgement in Case C-219/14 *Greenfield*

Calculating the duration of the entitlement to leave becomes tricky when working hours change. In an earlier judgement, the CJEU had already decided on the calculation in case working hours decrease (C-415/12 *Brandes*). Now, the Birmingham Employment Tribunal handed the Court the opportunity to rule on the inverse case. The facts of the main proceedings were these: Under the contract of employment between Kathleen Greenfield and Care Bureau, Ms Greenfield was entitled to 5.6 weeks of leave per year. She worked for one day per week between April and June 2012. In June and July 2012, she took seven days of paid annual leave. In August 2012, she increased her working hours to an average of 41.4 hours per week. When Ms Greenfield asked for a week of paid leave in November 2012, Care Bureau replied that through the seven days of leave she took in the summer, she had exhausted her entitlement to paid annual leave. Care Bureau argued that under national law, entitlement to paid leave was calculated at the date on which leave was taken, based on the working pattern for the 12-week period prior to the leave. The Birmingham Employment Tribunal wanted to know, inter alia, whether clause 4.2 of the Framework Agreement on part-time work and Article 7 of the Working Time Directive either require or prohibit that paid annual leave already accrued be recalculated retroactively in case of an increase in working hours. The Court held that EU law does not require this. It stated that in case of changing working hours it was necessary to calculate 'the number of units of annual leave accumulated in relation to the number of units worked' for each period separately. Also, the *pro rata temporis* principle from clause 4.2 of above named Framework Agreement could not be applied ex post. What EU law did require, though, was to make a new calculation for the period during which the working time is increased. More precisely,

for a situation such as Ms Greenfield's, EU law required first such a new calculation and then to deduct the units of annual leave taken during part-time that exceeded the right to paid annual leave accumulated during that period from the newly accumulated rights. While these are the minimum requirements of the Working Time Directive, the Court also held that Member States are not precluded from adopting provisions more favourable to workers and to recalculate the entitlement to paid annual leave as requested by Ms Greenfield. As regards another question of the preliminary reference, the CJEU also decided that for the calculation it does not matter whether the employment relationship is terminated or whether it continues.

Discrimination

No requirement of punitive damages: Judgement in Case C-407/14 *Arjona Camacho*

Article 18 of Directive 2006/54/EC requires Member States to ensure 'real and effective compensation or reparation' for damages that someone sustains as a result of discrimination of grounds of sex. This has to happen, it is also specified in this provision, in a way that is 'dissuasive and proportionate'. The Social Court No 1 of Córdoba wondered whether this might require Member States to introduce punitive damages. In Spanish law, punitive damages did not exist. The CJEU found that Directive 2006/54/EC does allow Member States to introduce punitive damages but it does not require them. The Court noted that Article 18 of the Directive 2006/54/EC reproduces the wording of Article 6(2) of Directive 76/207, as amended by Directive 2002/73. Regarding the earlier provision, the Court had found that Member States' measures have to have a genuine deterrent effect (Case C-271/91 *Marshall*) but they do not have include punitive damages, ie damages that go beyond full compensation for a loss. The Court agreed with the Advocate General that there has been no substantive change in EU law which might require a different interpretation of the new provision. The CJEU added that Article 25 of the same directive does not require punitive damages either but does allow Member States to introduce them. To make its point clear, the Court concluded that in a legal order such as the Spanish one 'Article 25 of Directive 2006/54/EC does not provide that a national court can on its own require the person responsible for the discrimination to pay such damages'. Had the Court found that a provision of EU law required punitive damages, this would have had implications far beyond the Articles in question. The decision at hand refrains from provoking clashes with traditional principles of civil law.

Different treatment of young people working during their school holidays or university vacations: Judgement in Case C-432/14 *Bio Philippe Auguste*

Under French law, young persons who work during their school holidays or university vacations are treated differently from other employees. They are not entitled to an insecurity payment that is payable if a fixed-term contract is not followed by an offer of permanent employment. A French student who worked for four days during his university vacation and who did not receive the end-of-contract-payment sued his employer before the Labour Tribunal of Paris. Just as in the well-known *Mangold* case (C-144/04), the legal conflict was staged solely to challenge the provisions at issue. As in that case, the CJEU still answered the questions it was asked by the national court, arguing that it was not a fictitious dispute, that the employment contract had been performed and that its application raised a question of EU law. Other than in *Mangold*, however, the Court did not find the relevant provision of national law to be precluded by EU law. In its judgement, the CJEU interpreted the principle of non-discrimination on grounds of age, as 'enshrined in Article 21 of the Charter of Fundamental Rights of the European Union and given specific expression by Directive 2000/78/EC'. This hybrid construction of legal sources is well established in the Courts adjudication on anti-discrimination matters (see eg *Mangold*, Case C-555/07 *Kücükdeveci* and Case C-476/11 *HK Danmark*) and enables the Court to make EU law directly applicable in cases between private individuals. The CJEU first questioned whether someone who only works for four days may be a worker in the meaning of Directive 2000/78/EC. While it expressed doubts, it left this to the national court to decide. It then went on to consider whether the French provision in question amounted to discrimination. The Court found that it did not as the situation of students was not comparable to that of workers who were entitled to end-of-contract-payment. Since they were to go back to school and university after their employment, they were not in a situation of job insecurity. Their employment was both temporary and ancillary, the Court argued.

Private International and International Procedural Law

Applicable law in actions for indemnity between insurers of tractor units and trailers: Judgement in Joined Cases C-359/14 and 475/14 *ERGO/P&C*

This decision on the Rome Regulations concerns the borders between contractual and non-contractual liability in EU law. In both of the joined cases, lorries were involved in road traffic accidents in Germany. In both cases, the tractor unit was insured by a different insurer than the trailer. The insurers of the tractor units paid the victims of the accidents compensation and then sought reimbursement from the insurers of the trailers. Since the insurers were not German but Latvian, the question arose which law was applicable to their relationship. The Court first considered whether Directive 2009/13/EC might have something to say on the matter since it dealt with measures guaranteeing protections to the victims of road accidents. However, the Court quickly found that this directive does not lay down conflict-of-law rules. It then turned to the Rome Regulations and to their respective scopes of contractual and non-contractual liability, arguing as follows: For a start, there are contractual relations between the insurer and the respective owners of the tractors and trailer but not between the insurers. Therefore, the very claim of one insurer against the other cannot be inferred from the insurance contracts themselves but is based on the premise that both the owner of the tractor unit and the trailer are liable to the victims of the road accidents. Such obligations of the owners are of a non-contractual kind in the meaning of Article 1 of the Rome II Regulation. Pursuant to Article 4 of the Rome II Regulation, the applicable law is therefore that of the country in which the damage directly resulting from the accident is suffered, ie in the present cases Germany. As regards the insurers, however, their liability towards the victims only arose because of the respective insurance contracts with the insured parties who were liable. The law applicable to those contracts is governed by Article 7 of the Rome I Regulation. For the classification of the relationship between the insurers, now, Article 19 of the Rome I Regulation is decisive. This provision deals with subrogation and stipulates that the law that governs the obligation of the third party (in the cases at hand: the insurers) also governs the subrogation of the victim's rights. Since the insurers' obligations arise in the Courts' view from the insurance contracts, the conditions under which the insurer may exercise the rights of the victims also depend on the national law that is applicable according to Article 7 Rome I Regulation. Still, the law that determines the persons who may be held

liable for the consequences of the road accident and the allocation of responsibility between them remains subject to Article 4 of the Rome II Regulation. Therefore, the Court concluded that the law applicable to an action for indemnity in cases such as the ones at hand 'is to be determined in accordance with Article 7 of the Rome I Regulation if the rules of liability in tort, delict and quasi-delict applicable to that accident by virtue of Article 4 *et seq* of the Rome II Regulation provide for apportionment of the obligation to compensate for the damage'.

Note: The primary responsibility for the areas of General Law of Contract and Obligations, Advertising, Passenger Rights and Package Holiday, Consumer Credit, as well as Competition Law, Public Procurement and State Regulation lies with Philipp Hacker, for the areas of Unfair Contract Terms, Employment Law, Leave, Discrimination, as well as Private International and International Procedural Law with Max Starke.